

In the United States Court of Appeals
for the Ninth Circuit

RICHMOND INVESTMENT COMPANY, IRENE RUTH
WOODS, MINTZER ESTATE COMPANY, MARIN LUM-
BER AND SUPPLY COMPANY, AND EVA OCKENDEN,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*Upon Appeal from the United States District Court
for the Northern District of California
Southern Division*

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court's memorandum and order (R. 21-22) is not reported. It was entered November 9, 1956, and sets forth the trial court's reason for rejection of appellants' objections to the taking.

JURISDICTION

The jurisdiction of the district court of this condemnation proceeding was invoked under the provisions of the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257, the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a) to 258(e), the Act of October 14, 1940, 54 Stat. 1125, 42 U.S.C. sec. 1521 *et seq.*, as amended, Executive Order No.

9070, dated February 24, 1942, and Executive Order No. 9150, dated April 28, 1942, funds having been appropriated by the Act of October 14, 1940 (Public Resolution 106, 76th Congress Land Acts supplementary thereto and amendatory thereof). Final judgment was entered by the district court on January 31, 1957, and notice of appeal was filed on February 5, 1957 (R. 27-29). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATUTE INVOLVED

The Lanham Act of October 14, 1940, as amended, 54 Stat. 1125, 42 U.S.C. sec. 1521, provides as follows:

In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator¹ (hereinafter referred to as the "Administrator") is authorized:

¹ By Executive Order 9070, the functions, powers and duties of the Federal Works Administrator were consolidated with those of other housing agencies of the Government and transferred to the National Housing Agency. By Executive Order 9150, the Federal Public Housing Commissioner of the National Housing Agency, was authorized to acquire and dispose of property. Subsequent to the filing of the present case there occurred other changes in the organization of the federal housing agencies which are irrelevant here.

(a) To acquire prior to the approval of title by the Attorney General * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease, * * * or condemnation, (including proceedings under sections 257, 258, 301-368, and 258a-258e of Title 40).

(b) By contract or otherwise * * * prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available, * * * *Provided*, That the cost per permanent family-dwelling unit shall not exceed an average of \$3,750 for all types of construction * * * *Provided further*, That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units: * * *

The Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257, provides as follows:

In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. * * *

QUESTION PRESENTED

Whether the Lanham Act authorized the condemnation of a fee simple title to land on which housing was to be constructed under the terms of the Act.

STATEMENT

In December, 1942, the United States instituted this proceeding to condemn the fee simple title to certain lands in the City of Richmond, California, for use in connection with defense housing (Compl., R. 3-7). A declaration of taking was filed and the sum of \$8,582.11 was deposited as estimated just compensation (R. 27). Appellants, defendant landowners, filed answers (R. 7-10, 10-12) alleging that fee title was not necessary and asking that the interest to be acquired be limited to a leasehold. By stipulation the measure of compensation was agreed upon and that issue was removed from contention. The stipulation reserved all other issues for the district court, more specifically "the issues relating to the legality and authority of the plaintiff, to take * * * the fee simple title to the subject property," and provided that such issues might be presented by motion, which was thereafter done (R. 13-16).

On January 29, 1957, the trial court filed findings of fact and conclusions of law (R. 22-26). The court found, *inter alia*, that the Acting Commissioner of the Federal Public Housing Authority had selected the condemned lands for use in connection with public housing and that he did not act in bad faith or abuse his discretion in making his determination

(Fdg. IV, R. 24). The district court found appellants' allegations that a fee simple title was not necessary were not true, and also that their allegation that a leasehold was sufficient was likewise untrue (Fdg. VI, R. 25). The court concluded that the Commissioner acted within the scope of his power and authority in selecting the lands and that "his determination that a fee interest in said lands should be taken is final." Judgment in accordance therewith was entered on January 31, 1957, and this appeal followed (R. 27-29).

ARGUMENT

This Court's Decision On An Identical Situation Concludes the Present Case

In disposing of appellants' objections the trial court stated (R. 21):

The Court has carefully considered each and all of the memoranda, the authorities there cited, and all other pertinent material. As a result of such consideration, the Court is of the view that every legal issue now sought to be raised by defendants in this case has been determined by the Court of Appeals in *Lewis v. United States*, 200 F.2d 183, and in each instance the issue has been determined adversely to the position which the defendants now seek to take in this case. This Court is bound by the decision of the Court of Appeals, so no useful purpose would be served by going beyond this statement of the Court's conclusion.

That the trial court was entirely correct in the view that this Court's decision in the *Lewis* case is

dispositive of the present case is apparent from a mere reading of that decision. The present case is an exact duplicate of the *Lewis* case, and in rejecting the same contentions now made by appellants, this Court exhaustively analyzed the relevant section of the Lanham Act, 42 U.S.C. sec. 1521, stating (200 F.2d at p. 184) :

Congress, under the Lanham Act, has delegated wide authority to the Federal Works Administration to condemn lands for use in carrying out the directives of the Act. In section 1 (a) the Administrator is given power to acquire land by "purchase * * * or condemnation." No distinction is made in the Act between what may be purchased and what may be condemned. And it now is well established that the Government's power to condemn is coextensive with its power to purchase [Citing cases]. Thus, if the Administrator might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may acquire the fee simple title by condemnation proceedings.

* * * *

* * * The Lanham Act does not limit the quantum of interest in property which may be acquired * * *. The Administrator was thus given discretion to acquire either the entire fee, or a lesser interest. Nor does the requirement that the acquired property be disposed of as quickly as possible after the emergency ceases preclude the acquisition of the entire fee. For "the government, just as anyone else, is not required to proceed oblivious to elements of cost" in the exercise of its power of eminent domain (p. 185).

The trial court's further conclusion that the Commissioner's determination "that a fee interest should be taken is final" is no more open to question. On this subject this Court stated in the *Lewis* case (200 F.2d at p. 185) :

Congress, by the Lanham Act, has empowered the Administrator at his discretion to acquire the land needed for defense housing by condemnation, and to take the interest which in his opinion will be most advantageous to the Government. There is no claim of bad faith in this case, and we cannot say that the evidence required a finding that the authorized officer abused his discretion in determining the amount and interest in land he decided to condemn. Therefore, his decision was final. *United States v. Meyer*, 7 Cir., 1940, 113 F.2d 387; *Simmonds v. United States*, 9 Cir., 1952, 199 F.2d 305.

The Supreme Court denied the petition for writ of certiorari in the *Lewis* case, 345 U.S. 907.

The only event of significance here subsequent to the *Lewis* decision is the reaffirmation by the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), of the principles there declared by this Court.

Not only are the relevant facts of the *Lewis* case identical to those here presented but the principal appellants were also appellants in the *Lewis* case.¹ Moreover the objections made and arguments advanced both to this Court and to the Supreme Court

¹ The *Lewis* case was actually two cases and in No. 13207 the appellants included Richmond Investment Co., Mintzer Estate Company and Irene R. Woods who are also appellants here.

in the *Lewis* case were the same as are now advanced by appellants. A comparison of appellants' present brief with those filed in the *Lewis* case demonstrate that nothing new or different is here presented. Appellants fail therefore to suggest any reasonable doubt as to the correctness of the *Lewis* case. The fallacies of the appellants' arguments were made clear in our briefs in the *Lewis* appeal. We respectfully refer this Court to those briefs should it desire to do so.

CONCLUSION

Since for the reasons stated we believe that the appeal is frivolous and does not merit the time of all concerned and the expense of oral argument, we are filing herewith a motion to affirm summarily. It is submitted that the judgment below should be affirmed.

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